Sri Minal Construction Sdn Bhd v Mobil Oil Malaysia Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T–04–118 OF 2002
ABDUL KADIR SULAIMAN, ABDUL AZIZ MOHAMAD JJCA AND JAMES FOONG J
5 APRIL 2004

Civil Procedure — Judgment — Setting aside — Application for — Judgment in default of appearance — No notice given to defendants prior to entry of judgment in default — Whether non-compliance with Legal Profession (Practice and Etiquette) Rules 1978 made judgment irregular — Legal Profession (Practice and Etiquette) Rules 1978 r 56

Civil Procedure — Subordinate court — Default judgment — Absence of defendant and his counsel — Judgment in default of attendance on a 'mention' date — Whether judgment in default validly entered — Subordinate Courts Rules 1980 O 28 r 6

Civil Procedure — Subordinate court — Default judgment — Counsel requested another date to file their defence — Court did not specifically order defence to be entered — Whether there must be express order — Subordinate Courts Rules 1980 O 14 r 5(3)

On 1 November 1999, the sessions court gave judgment in default for the plaintiffs. The judgment was one in default of attendance and also in default of defence. By a notice of application the defendants sought to have the judgment in default set aside. The sessions court dismissed the defendants' application. The High Court dismissed the defendants' appeal. The first point raised by the defendant was that no notice was given to the defendants prior to the entry of the judgment in default, and that was said to be a breach of r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the professional rules'). The second point of law raised by the defendants' counsel was that the sessions court had jurisdiction to give judgment for a plaintiff under O 28 r 6(1) of the Subordinate Courts Rules 1980 ('the SCR') by reason of the defendant's absence if the defendant's absence was on a date for hearing, but not if it was on a date for 'mention', as the date 1 November 1999 was in this case. The third point of law raised by the defendants' counsel was that judgment ought not to have ordered to be entered for the plaintiffs for the defendants' failure to serve a defence because the court had not made an order under para (2) of O 14 r 5 of the SCR for the defendants to serve a defence.

Held, dismissing the appeal:

(1) (per **Abdul Aziz Mohamad JCA**) The failure of the plaintiffs' solicitors to give the required notice did not have the effect of making the judgment in default an irregular judgment. The rules of court are the rules that govern litigants in the field of litigation. And it is litigants (plaintiff, defendant, and so on) who are mentioned in the rules of court. They do not govern a litigant's attorney. A litigant cannot be made to suffer the consequences of his attorney's failure to observe the professional rules because the rules do not govern the litigant (see para 5).

(2) (per **Abdul Aziz Mohamad JCA**) Although the definition of 'hearing' does not expressly include a 'mention', it is included by the words 'any proceedings', so that when O 28 r 6 of the SCR speaks of an action being 'called on for hearing' it means that the action is called on for the conduct of any proceedings related to the action, and in that context 'proceedings' can only mean any business that needs to be conducted (see para 15).

(3) (per **Abdul Aziz Mohamad JCA**) An order under O 14 r 5(3) of the SCR for entry of judgment can only be made if a defendant fails to comply with an order made under para (2) that the defendant serve a defence within a specified time. There would be no failure to comply if there has been no order, and if there has been no failure to comply, entry of judgment cannot be made under para (3). The court granted the request by the defendants to serve a defence but did not order it. There must have been an express order. The judgment was given on two grounds and even though not valid on one ground, nevertheless remained good and regular on the ground that was valid (see paras 17–19).

(4) (per **James Foong J**) The Legal Profession (Practice and Etiquette) Rules is, as declared in s 77(1) of the Legal Profession Act 1976, only for the purpose of regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. It is an in house regulation of members of the Bar. And any breach thereof, an advocate and solicitor is liable to be disciplined under the said rules. The rules made thereunder had no force of law to override or govern the procedure of the courts (see para 56).

(5) (per **James Foong J**) When defence was not filed at the request of the defendant, the learned sessions court judge granted indulgence. The reason he ordered another mention date to be fixed must be implied to mean that defence ought to be filed by the defendant before 1 November 1999. There could be no other inference to be drawn except compliance of this order by the next mention date. The demand for the learned sessions court judge to specifically spell out a particular date to file defence was unnecessary in the circumstances of this case (see para 64).

Obiter:

(per **James Foong J**) The unilateral appearance of counsel before the sessions court judge without notification to the opponent, and the learned sessions court judge entertainment of them in setting aside orders previously made were actions that a sessions court judge and magistrate should restrain from partaking. Such undertakings breached natural justice and render orders made thereunder a nullity (see para 43).

[Bahasa Malaysia summary

Pada 1 November 1999, mahkamah sesyen telah memberikan penghakiman ingkar kepada plaintif-plaintif. Penghakiman tersebut adalah untuk keingkaran kehadiran dan juga keingkaran pembelaan. Melalui satu notis permohonan, defendan-defendan memohon agar penghakiman ingkar tersebut diketepikan. Mahkamah sesyen telah menolak permohonan defendan-defendan. Mahkamah Tinggi telah menolak rayuan

defendan-defendan. Perkara pertama yang ditimbulkan oleh defendan-defendan adalah tidak ada notis diberikan kepada defendan-defendan sebelum penghakiman ingkar dimasuki, dan ia dikatakan suatu perlanggaran k 56 Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 ('kaedah-kedah profesional'). Perkara perundangan kedua yang ditimbulkan oleh peguam defendan-defendan adalah bahawa mahkamah sesyen mempunyai bidang kuasa untuk memberikan penghakiman terhadap seorang plaintif di bawah A 28 k 6(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') dengan alasan ketidakhadiran defendan-defendan jika defendan-defendan tidak hadir pada tarikh perbicaraan, tetapi bukan begitu jika ia adalah pada tarikh 'sebutan', seperti pada 1 November 1999 dalam kes ini. Perkara perundangan ketiga yang ditimbulkan oleh peguam defendan-defendan adalah bahawa penghakiman tidak sepatutnya diperintahkan untuk dimasuki menyebelahi plaintif-plaintif disebabkan kegagalan defendan-defendan untuk menyampaikan pembelaan kerana mahkamah tidak membuat perintah di bawah perenggan (2) A 14 k 5 KMR supaya defendan-defendan menyampaikan pembelaan.]

Diputuskan, menolak rayuan tersebut:

(1) (oleh **Abdul Aziz Mohamad HMR**) Kegagalan peguam plaintif-plaintif untuk memberikan notis yang diperlukan tidak memberi kesan kepada penyampaian penghakiman ingkar sehingga menjadikannya suatu penghakiman yang di luar aturan. Kaedah-kaedah mahkamah adalah kaedah-kaedah yang mengawal litigan dalam bidang litigasi. Dan litigan (plaintif, defendan, dan seterusnya) adalah mereka yang disebutkan dalam kaedah-kaedah mahkamah. Ia tidak mengawal peguam litigan. Seorang litigan tidak boleh menanggung akibat daripada kegagalan peguamnya untuk meneliti kaedah-kaedah profesional kerana kaedah-kaedah tersebut tidak mengawal litigan (lihat perenggan 5).

(2) (oleh **Abdul Aziz Mohamad HMR**) Meskipun tafsiran 'perbicaraan' tidak dengan nyata termasuklah suatu 'sebutan', ia terangkum dalam perkataan-perkataan 'apa-apa prosiding', jadi apabila A 28 k 6 KMR menyebut tentang tindakan 'dipanggil untuk dibicarakan', ia bermaksud tindakan itu dipanggil untuk pelaksanaan apa-apa prosiding berkaitan dengan tindakan itu, dan dalam konteks 'prosiding' hanya boleh bermaksud apa-apa urusan yang perlu dilaksanakan (lihat perenggan 15).

(3) (oleh **Abdul Aziz Mohamad HMR**) Suatu perintah di bawah A 14 k 5(3) KMR untuk kemasukan penghakiman hanya boleh dibuat jika defendan gagal untuk mematuhi suatu perintah yang dibuat di bawah perenggan (2) di mana defendan hendaklah menyampaikan suatu pembelaan dalam tempoh masa yang ditetapkan. Tiada kegagalan untuk mematuhi jika tiada perintah, dan jika tidak ada kegagalan untuk mematuhi, kemasukan penghakiman tidak akan dibuat di bawah perenggan (3). Mahkamah membenarkan permintaan defendan-defendan untuk menyampaikan pembelaan tetapi tidak memerintahkannya. Perlu ada perintah yang nyata. Penghakiman diberikan berdasarkan dua alasan dan meskipun ia tidak sah atas satu alasan, ia masih elok dan tetap berdasarkan alasan yang sah itu (lihat perenggan 17–19).

(4) (oleh **James Foong H**) Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 adalah, seperti yang dinyatakan dalam s 77(1) Akta Profesyen

Undang-Undang 1976, hanya untuk tujuan mengawal amalan profesional, etika, perlakuan dan tatatertib peguambela dan peguamcara. Ia adalah peraturan dalaman ahli-ahli Badan Peguam. Dan jika dilanggar, seorang peguambela dan peguamcara adalah bertanggungjawab untuk didisiplinkan di bawah kaedah tersebut. Kaedah-tersebut tidak mempunyai kuasa undang-undang untuk mengatasi atau mengawal prosedur mahkamah (lihat perenggan 56).

(5) (oleh **James Foong H**) Apabila pembelaan tidak difailkan atas permintaan defendan, hakim mahkamah sesyen yang bijaksana telah memberikan kelonggaran. Alasan beliau memerintahkan suatu tarikh sebutan harus disifatkan sebagai bermaksud pembelaan patut difailkan oleh defendan sebelum 1 November 1999. Tidak ada inferens lain yang boleh diperoleh daripada perintah ini mengikut tarikh sebutan seterusnya. Arahan hakim mahkamah sesyen untuk menyatakan suatu tarikh yang spesifik untuk memfailkan pembelaan tidaklah perlu dalam keadaan kes ini (lihat perenggan 64).

Obiter:

(oleh **James Foong H**) Kehadiran peguam di satu pihak di hadapan hakim mahkamah sesyen tanpa pemberitahuan kepada pihak satu lagi, dan hakim mahkamah sesyen yang melayan mereka dengan mengenepikan perintah-perintah yang dibuat sebelumnya adalah tindakan-tindakan yang mana hakim mahkamah sesyen dan majistret patut elak daripada turut serta.. Perlakuan sebegini telah melanggar keadilan asasi dan menyebabkan perintah-perintah yang dibuat tidak sah (lihat perenggan 43).

Notes

For a case on default judgment in subordinat court, see 2(2) *Mallal's Digest* (4th Ed, 2002 Reissue) para 2626.

For cases on setting aside judgment, see 2(2) *Mallal's Digest* (4th Ed, 2002 Reissue) paras 171–235.

Case referred to

Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 (folld)

Evans v Bartlam [1937] AC 473 (refd)

Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd [2000] 4 MLJ 289 (refd)

Lee Ah Kong v Leong Koo [1996] 2 MLJ 229 (refd)

Muniandy a/l Thamba Kaundan v D and C Bank Bhd [1996] 1 MLJ 374 ; [1996] 1 MLJ 374 (refd)

PL Construction Sdn Bhd v Abdullah bin Said [1989] 1 MLJ 60 (folld)

RHB Finance Bhd v CN Corporate Network (M) Sdn Bhd [2000] 5 MLJ 686 (refd)

Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd [1982] 2 MLJ 79 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Wan Mohd Sofian bin Wan Md Saad v MBF Finance Bhd [2000] 5 MLJ 319 (refd)

White v Weston [1968] 2 All ER 842 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 17
Legal Profession (Practice and Etiquette) Rules 1978 r 56
Legal Profession Act 1976 s 77(1)
Rules of the High Court 1980 O 1 r 1, O 92 r 4
Subordinate Courts Rules 1980 O 1 r 6, O 14 r 5(2), (3), O 28 r 6(1), O 43, O 45, Form 1

Appeals from: Civil Appeal No 12–15 of 2000 (High Court, Kuala Terengganu) and Suit No 52–524 of 1999 (Sessions Court, Kuala Terengganu)

Vignesh Kumar (Balendran, Chong & Bodi) for the appellants.
M Kanesan (Chen, Leong & Co) for the respondents.

Abdul Aziz Mohamad JCA:

[1] On 1 November 1999, the sessions court gave judgment in default for the plaintiffs, Mobil Oil Malaysia Sdn Bhd, on their claim. By a notice of application dated 3 January 2000 the defendants, Sri Minal Construction Sdn Bhd, sought to have the judgment in default set aside. The sessions court dismissed the defendants' application. The High Court dismissed the defendants' appeal. The defendants appealed to this court. We dismissed the appeal.

[2] As may be seen from the grounds of judgment of my learned brother James Foong JCA, between the time when the default judgment was given and the time when the defendants formally applied to have it set aside, the default judgment was set aside upon the defendants' counsel making representations to the sessions court judge in the absence of the plaintiffs' counsel and subsequently the judgment in default was reinstated upon the plaintiffs' counsel making representations to the sessions court judge in the absence of the defendants' counsel. As my learned brother says, those two intervening events had become a matter of history and were not relevant to the appeal before us, as the appeal arose out of the defendants' ultimate formal application for the setting aside of the default judgment as reinstated. The appeal was not directed against the reinstatement. In fact, in his oral submission in the appeal the defendants' counsel did not raise any issue as regards those events. Nevertheless, I feel that I should state, sharing the sentiment of my learned brother, that what happened in those two events was wrong, particularly what happened in the first event, because if the first event had not occurred, the second event would not have taken place. Where one party has obtained an order, the court ought not, at the instance of the other party, do anything that has the effect of undoing the order or depriving the gaining party of the benefit of it without giving him an opportunity to be heard. It is simply a matter of a fundamental rule of natural justice.

[3] In submission in the appeal before us, the defendants' counsel raised three grounds involving points of law for contending that the default judgment had been irregularly obtained. The first point was that no notice was given to the defendants

prior to the entry of the judgment in default, and that was said to be a breach of r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the professional rules'). The rule states as follows:

> 56 Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other in the proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

Notice is required before entering judgment by default or before taking advantage of delay. In what I am going to say about r 56, I am looking primarily at the requirement of notice before entering judgment by default.

[4] Incidentally, there appear to be two errors in the rule. The word 'to' should not appear in the phrase 'to take advantage of delay'. Either a word is missing after the word 'other' in the phrase 'in complying with any other in the proceedings' or that word should read 'order'.

[5] I shared the view of my learned brother that the failure of the plaintiffs' solicitors to give the required notice did not have the effect of making the judgment in default an irregular judgment. I was in no doubt that the opinion of Zakaria Yatim J on the point in *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 is correct. He repeated that opinion in *PL Construction Sdn Bhd v Abdullah bin Said* [1989] 1 MLJ 60, which was another of the cases on the point, besides the four mentioned by my learned brother, that were cited to us by the defendants' counsel. As Zakaria Yatim J said in *Asia Commercial Finance* at p 34, 'judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the Rules of the High Court 1980, that is to say, not if the plaintiffs' solicitors failed to comply with the professional rules. I shall attempt to demonstrate the correctness of that statement. The rules of court are the rules that govern litigants in the field of litigation. And it is litigants (plaintiff, defendant, and so on) who are mentioned in the rules of court. They do not govern a litigant's attorney. It is the litigant that has to obey the rules. His attorney merely acts to ensure that the client obeys the rules. If a rule is not obeyed it is the litigant who will suffer the consequences, not his attorney, and the consequences are such as have a bearing on the course or fate of the litigation. That is so, generally speaking, even if the failure to obey is the result of some fault on the attorney's part. If in such a case the attorney is to suffer any consequences, it will be in the nature of liability to his client arising in the main from their contractual relationship. On the other hand, it is the professional rules that govern the conduct of attorneys in the practice and pursuit of their profession. These rules have as their objective the good of the profession and of the public that it serves. They do not govern the people that the profession serves. The consequences of a breach of the rules must fall on the attorney concerned. They must not fall on his client so that he suffers detriment in his cause or matter, because the rules do not govern the client.

A litigant suffers the consequences of a failure to obey the rules of court brought about by his attorney's fault because the rules govern the litigant. A litigant cannot be made to suffer the consequences of his attorney's failure to observe the professional rules because the rules do not govern the litigant. To make a litigant suffer the consequences of his attorney's failure to obey the professional rules would have the effect of making the rules applicable to him whereas by their terms they are not. Even if the makers of the professional rules, the Bar Council, wish to expressly provide in r 56 that the result of failure to give the required notice is that the judgment by default that is entered is irregular and may be set aside ex debito justitiae, they cannot do so, and the reason is this. Although r 56 speaks of judgment by default being entered by an advocate and solicitor, by rules of court (see, for example, O 13 and O 19 of the Rules of the High Court 1980), it is the litigant, not his attorney, who enters the judgment. It is the right of the plaintiff to enter judgment, exercisable by him. Such a provision in r 56 would be tantamount to the imposition on a plaintiff of the requirement of a notice by his solicitors before he can successfully enter a judgment by default. That would be legislating on a matter proper to the realm of rules of court and legislating on the action of litigants in the conduct of their litigation. The Bar Council cannot make such a provision because their powers under s 77(1) of the Legal Profession Act 1976 are confined to making rules 'for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors' and not rules of court or rules regulating litigants in the field of litigation.

[6] Even a consideration of r 56 itself will show that a failure to give the required notice could not have been intended to affect the judgment by default that is entered. The notice is not required if the plaintiff or claimant himself enters judgment by default or if it is not known that the other side is represented. The notice is therefore not a requirement that is intended as a measure to confer any benefit or secure any protection to the litigant on the other side. If it were, one would expect the notice to be required also even if the plaintiff acts in person and to be required in any case if the other side is not represented. If it were, we would have a situation where a defendant who is represented is procedurally treated more caringly than one who is not, whereas one would expect the position to be the reverse. The purpose of the requirement has nothing to do with litigants. The requirement might have been intended as a measure that would promote or preserve courteous relationship between solicitors. Failure to observe such a requirement in doing an act for the client cannot affect the validity of the act. Or it might have been intended that the notice have the practical use of enabling the solicitor for the other party to repair any omission that may have occurred on his part in his duties to his client that has resulted in the default by reason of which the judgment is proposed to be entered, so as to avoid incurring any liability to his client for the omission. It is to protect or benefit the solicitor, not his client. Therefore, failure of observance of the requirement ought not to prejudice the plaintiff by rendering the judgment that is entered irregular. It would be a use for the benefit or protection of the litigant himself if the intention of the notice is — the question of any default or omission on the part of his solicitor aside — to enable the litigant to take steps to avoid or prevent the judgment in default being entered. But if that is the intention the notice should be given in any case to the client or to his solicitor even though the defendant or the plaintiff acts in person. Since the notice is not required where the defendant or the plaintiff acts in person, such cannot be the intention.

[7] The last thing I have to say about r 56 is that it speaks about the act of entering judgment by default. It seems to me that the rule contemplates an act of entering judgment such as is performed under O 13 when there has been default of appearance to a writ or under O 19 when there has been failure to serve a defence, that is to say, an act that is performed in the registry and not in the courtroom. As will shortly be seen, the judgment in this case was an order of the court made in the course of proceedings in court. I do not think that that is an act of entering judgment by default that is intended by r 56.

[8] For a proper appreciation and the convenient disposal of the other two points of law, it is necessary to set out the relevant events and the rules concerning them.

[9] The summons was dated 18 July 1999. It was in Form 1 in the Subordinate Courts Rules 1980. It summoned the defendants to appear before the sessions court on 27 September 1999 at 9am to answer the plaintiffs' claim. It gave notice that within seven days of service of the summons the defendants may enter an appearance by using the appended notice of appearance. It warned the defendants that in default of their attendance on 27 September 1999 at 9am judgment might be entered against them.

[10] Relevant to the notice as regards appearance that was given in the summons is O 14 r 5(1) of the Subordinate Courts Rules 1980, which provides as follows:

> (1) A defendant who disputes his liability for the whole or part of any claim in the action may —
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> (a) at any time before the return day, serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used; or
>
> (b) appear on the return day and dispute the plaintiff's claim.

[11] Relevant to the notice given in the summons as to the consequence of default in attendance is O 28 r 6(1), which provides as follows:

> (1) If, when an action … is called on for hearing, the plaintiff appears but the defendant does not appear, the court may:
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> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
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> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and
>
> make any other order as it thinks just.

[12] It was not disputed that on 16 August 1999, before the return date, the defendants entered an appearance stating that they disputed the plaintiffs' claim.

[13] On the return date, 27 September 1999, counsel for both sides appeared. The case was adjourned to enable the defendants to serve their defence and was fixed for

'mention' on 1 November 1999. On that date the defence had not been served. The plaintiffs' counsel appeared but at 9.10am the defendants' counsel still had not appeared. So the sessions court judge gave judgment against the defendants. According to the judgment, at p 29 of the appeal record, the judgment was one in default of attendance and also in default of defence. Relevant to the judgment as one in default of defence are paras (2) and (3) of O 14 r 5, which are as follows:

(2) where a defendant appears in court and disputes the plaintiff's claim, the court may order him to serve a defence within such time as it may direct; and

(3) if a defendant fails to comply with the order of the court made under para (2), the court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff.

[14] The second point of law raised by the defendants' counsel was that the sessions court has jurisdiction to give judgment for a plaintiff under O 28 r 6(1) by reason of the defendant's absence if the defendant's absence is on a date for hearing, but not if it is on a date for 'mention', as the date 1 November 1999 was in this case. That is because of the words 'when an action … is called on for hearing'. Counsel submitted, in support of his contention, that the word 'hearing', while it is defined in O 1 r 6(1) to mean 'any proceedings in court or in chambers', is not defined to include a 'mention'. Counsel relied on the cases of *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 and *Lee Ah Kong v Leong Koo* [1996] 2 MLJ 229, but those cases were of no assistance because they did not concern judgment in default of attendance on a 'mention' date and moreover, in *Shaharuddin*, although the defendant did not appear on the date in question, his counsel did.

[15] The word 'mention' is used in the day-to-day conduct of court business to indicate generally that a matter is fixed for some business other than the actual battle, that is the hearing of evidence or submission, so that parties and their counsel need not come prepared for it, but they are still obliged to be present for the conduct of the business, unless the presence of either party is excused by the court or the business is such that counsel for one party agrees to appear also on behalf of the solicitors for the other party. Although the definition of 'hearing' does not expressly include a 'mention', it is included by the words 'any proceedings', so that when O 28 r 6 speaks of an action being 'called on for hearing', it means that the action is called on for the conduct of any proceedings related to the action, and in that context 'proceedings' can only mean any business that needs to be conducted. Therefore, since counsel's point relied on the meaning of 'hearing' in O 28 r 6 in the light of the definition in O 1 r 6, the point, in my opinion, failed. The action was called on for hearing and since the plaintiffs appeared (by their counsel) and the defendants did not appear, the court had jurisdiction to give judgment for the plaintiffs.

[16] The third point of law raised by the defendants' counsel was that judgment ought not to have ordered to be entered for the plaintiffs for the defendants' failure to serve a defence because the court had not made an order under para (2) of O 14 r 5 for the defendants to serve a defence.

[17] In my judgment, paras (2) and (3) of O 14 r 5 are very clear on this point. An order under para (3) for entry of judgment can only be made if a defendant fails to comply with an order made under para (2) that the defendant serve a defence within a specified time. There would be no failure to comply if there has been no order, and if there has been no failure to comply, entry of judgment cannot be made under para (3).

[18] In this case, judging by the notes of proceedings at p 87 of the appeal record, on the return date, 27 September 1999, the court, while fixing the case for mention on 1 November 1999, did not order the defendants to serve a defence. According to the defendants, it was their counsel who requested for another date to enable them to file their defence. The court granted the request. In granting the request, the court might have hoped that by 1 November 1999, the defence would be served and might not have felt it necessary to actually order service of a defence. Or the court might have intended to so order. But the court certainly did not order. There must have been an express order. The circumstances were not even such that an order must be taken to be implied. As I said, the sessions court judge might not have felt it necessary in granting another date to order the service of defence, trusting that it would be done by the next date.

[19] In my judgment, therefore, the court ought not to have ordered judgment on the ground of failure to serve a defence. But the judgment that was given was nevertheless regular because it was correctly given on the ground of absence. The judgment was given on two grounds, each of which, if valid, was sufficient to justify the giving of judgment. Therefore, even though one ground was not valid, the judgment remained good and regular on the ground that was valid.

[20] The default judgment, although irregularly entered, could, nevertheless, still be set aside if the defendants could show a prima facie defence. I found that the defendants failed to show a prima facie defence. I proceed to state my reasons.

[21] In their statement of claim dated 6 July 1999, the plaintiffs averred that from time to time, at the defendants' request, they supplied to the defendants petroleum products on Account No MY 241350 and that the defendants had failed, despite demand, to pay RM149,905.40, being the price of petroleum products supplied. The plaintiffs' principal claim was that sum. On 25 October, about one month after the return date for the summons (when the defendants' counsel requested for another date to enable the defendants to serve their defence) and only three days before the next date that was given, the defendants' solicitors wrote to the plaintiffs' solicitors for particulars of the date, value and place of delivery of each consignment said to have been delivered from time to time and of the date and invoice number of each consignment that made up the sum claimed of RM149,905.40. Those particulars were not supplied.

[22] In their affidavit in support of their application for the setting aside of the default judgment, which was affirmed by their solicitor, the defendants claimed to have good defences on the merits and stated two of them, namely, first, that the plaintiffs failed to deliver the correct quantity of petrol, and second, that the plaintiffs

failed to furnish the particulars asked for. The second was actually not a defence on the merits. What the defendants perhaps meant to say was that without those particulars they were not able to present other defences in their affidavit. Although a proposed statement of defence was exhibited from which other defences might be discerned, these were not claimed in the affidavit itself. So the plaintiffs in their affidavit in reply had nothing to reply to on the question of defence on the merits beyond the allegation of failure to deliver the correct quantity, and in the High Court and in the appeal before us the question of defence on the merits could only turn on that allegation.

[23] In support of that allegation, the defendants exhibited two police reports. The first was made on 14 October 1997 by Encik Anand bin Subroto, a general labourer of the defendants', who said that on 13 October 1997 the driver of the lorry which came to deliver petrol to the defendants on that day gave him RM500 without reason after delivering the petrol into the defendants' tank No. 1 and that after the tank was inspected by the Project Engineer, Encik Yong Hee Leong, it was found that the tank was short of petrol by 2,800 litres. The second police report was made on 15 October 1997 by Encik Yong who said that on that day, when the lorry arrived for delivery, he went up the lorry and found that the middle tank was half full of petrol while the front tank was still full. He concluded, as he said in the report, that petrol had been sent to the defendants' tank No 2 not in accordance with the order made on 14 October 1997, which was for 10,920 litres. It was not clear from the report whether Encik Yong examined tank No.2 and what the significance was of the middle tank in the lorry being half full. The report did not say by how much the delivery on 15 October 1997 was deficient, if at all.

[24] In their affidavit in reply, the plaintiffs said that at all times they had delivered the quantities ordered by the defendants and they had never received from the defendants any complaint of short supply either orally or in writing. If the allegation of short supply on 13 and 15 October was true, said the plaintiffs, the defendants would or should have informed the plaintiffs, but this they did not do. On the contrary, said the plaintiffs, the delivery orders were signed acknowledging delivery as ordered, and the invoices were not questioned. The plaintiffs exhibited the delivery orders and the invoices relating to the supplies on those two days. Encik Anand, who made the first police report, signed the delivery orders as having received the goods in good condition. The delivery orders and invoices showed that each of those two days' consignments was of 10,920 litres at RM0.6500 per litre including duty. There was no reply by the defendants to the plaintiffs' averments. The plaintiffs' averments that the defendants never complained about the alleged deficiency and did not question the related invoices must therefore be taken to be true. That and the fact that the defendants acknowledged receipt of the consignments would deprive of merit their defence of short supply. For that reason, I was of the view that the allegation of short supply did not constitute a defence on the merits.

[25] As regards the plaintiffs' failure to furnish the particulars sought by the defendants, the plaintiffs in their affidavit said that the defendants had full knowledge of the particulars of the goods ordered by them and delivered by the plaintiffs. There was no reply to that by the defendants. Apart from the defendants' silence signifying

that they accepted what the plaintiffs averred to be true, I could not accept it as probable that the defendants did not have the particulars. The plaintiffs would not have delivered goods unless the defendants ordered them. The defendants would have a record of their orders and of the delivery or failure to deliver, if any, in response to each order. They would also have received a delivery note and an invoice in respect of each delivery as they did in respect of the deliveries on 13 and 15 October 1997. It was therefore not acceptable that the defendants were unable to come up with a statement of defence or to raise in their affidavit other defences than that of short supply on those two dates.

[26] As the judgment in default was regular and as the defendants failed to show a defence on the merits, they were not entitled to have the judgment set aside.

[27] I should mention that as the first police report complained of short delivery by the specific amount of 2,800 litres and as the second police report did not specifically complain of short delivery and therefore did not specify any amount of deficiency, the plaintiffs, in para 3.7 of their written submission in the appeal, stated that they were prepared to waive their claim to the extent of RM1,820 so that if the court would reduce the judgment by that amount, that would 'effectively dispose of the whole action. RM1,820 was the price of 2,800 litres at RM0.6500 per litre. Perhaps in dismissing the appeal we ought to have reduced the judgment sum by RM1,820. That would deprive the defendants of any ground for further claiming that they have a defence as regards short supply.

James Foong J:

INTRODUCTION

[28] On 1 November 1999, the respondent who was the plaintiff in the Sessions Court at Kuala Terengganu obtained judgment in default of defence against the appellant/defendant on a claim of RM149,905.40 for goods sold and delivered by the respondent to the appellant.

[29] For convenience in the judgment, the parties will be referred to as the defendant and the plaintiff, respectively.

[30] The defendant's attempt to set aside the said default judgment on 22 February 2000 before the sessions court judge failed. Dissatisfied, the defendant appealed to the High Court.

[31] The learned High Court judge dismissed the appeal. Hence this present appeal by the defendant.

BACKGROUND

[32] The facts of this case commenced with a summons filed by the plaintiff in the Sessions Court at Kuala Terengganu against the defendant on 18 July 1999. The return date of the summons was 27 September 1999.

[33] The defendant through its solicitors, filed an appearance. The statement of defence did not follow. A

[34] On the return date, both plaintiffs and defendant's counsel appeared before the learned sessions court judge. Since statement of defence was not filed by then, the learned sessions court judge, at the request of the defendant's counsel, adjourned the case to 1 November 1999 to enable the defendant to do so. B

[35] Three days before 1 November 1999 the defendant's solicitor wrote to the plaintiff's solicitor for further and better particulars.

C

[36] However, until about 9.10am on 1 November 1999, both the defendant and its counsel were absent. Accordingly, the learned sessions court judge entered judgement in default against the defendant.

[37] Later on the same day (1 November 1999) at or about 11.14am, counsel for the defendant met the learned sessions court judge in his chambers in the absence of the plaintiff or its counsel and, without their knowledge, persuaded the court to set aside the default judgement which he did and have a new mention date fixed for 6 December 1999. D

[38] By 3 December 1999, receiving no further and better particulars sought from the plaintiff, the defendant filed and serve on the plaintiff an application seeking for the particulars. E

[39] Unfortunately, on 6 December 1999, none of the parties appeared in the sessions court. The case for the plaintiff was accordingly struck off by the court. F

[40] When the plaintiff or its counsel became aware of what had happened, the plaintiff's counsel, unilaterally, met the learned sessions court judge and induced him to reinstate the summons; set aside the order made at 11.14am on 1 November 1999; and restored the judgement in default obtained against the defendant on 1 November 1999 at 9.10am. G

[41] On 3 January 2000, when the defendant realized what has happened, it filed an application to set aside the judgement in default secured by the plaintiff on 1 November 1999.

H

[42] This application to set aside the default judgment of 1 November 1999 is the subject matter for our consideration.

OBSERVATION

I

[43] The events that transpired in the sessions court require us to comment on the undesirable actions undertaken by parties and the court in this case. The unilateral appearance of counsel before the sessions court judge without notification to the opponent, and the learned sessions court judge entertainment of them in setting

aside orders previously made are actions that a sessions court judge and magistrate should restrain from partaking. Such undertakings breached natural justice and render orders made thereunder a nullity. These are clearly expressed in the Federal Court decision of*Muniandy a/l Thamba Kaundan v DC Bank Bhd* [1996] 1 MLJ 374 where Edgar Joseph Jr FCJ at p 383 declares:

[44] In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity.

[45] Stressing further on the effects of such order or judgement obtained in such ex parte manner, the Federal Court, in the same case quoted Russell LJ in *White v Weston* [1968] 2 All ER 842 (CA) who stressed that such defects:

> … is in my judgment so fundamental as to entitle the defendant as of right, ex debito justitiae, to have the judgement avoided and set aside.

[46] Repeating such sentiments Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36 announces:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms.

[47] Since the appeal before us is only confined to the application in the subordinate court by the defendant to set aside the default judgment of 1 November 1999 and not the many other ex parte orders made thereafter, we believe the parties in this case must have realized the futility of the exercise if they did. On this, we shall deal no further into this matter and shall proceed to consider the merits of the appeal before us.

ANALYSIS

First Issue: Breach of r 56 of the Legal Profession (Practice and Etiquette) Rules 1978

[48] The first issue raised by counsel for the defendant is that the default judgment should be set aside by the failure of the plaintiff to give notice of intention to obtain such judgment under r 56 of the Legal Profession (Practice and Etiquette) Rules. He contended that such rules has the force of law, and failure to comply would render the default judgment irregular and ought to be set aside. To support this he cited three cases which we shall be examining shortly.

[49] From the plaintiff, there is, firstly, an admission that such notice of warning to the defendant to file its defence within a certain specified period and failure to do

so would be liable to a default judgment being entered was never given to the defendant. But to the plaintiff this is not detrimental. Such requirement has no force of law; it is only an internal regulatory procedure governing lawyers. Two cases supporting this proposition were brought to our attention.

[50] Faced with such conflicting authorities, we shall begin by examining r 56 of the Legal Profession (Practice and Etiquette) Rules which states:

> Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party, to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and [seven days] shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

[51] In *Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd* [2000] 4 MLJ 289, a case where the defendant attempts to set aside a judgment in default of defence without notice of intention to do so previously tendered to the defendant, Abdul Malik Ishak J in setting aside of the judgment has this to say:

> It was my judgment and I so hold that all the facts as alluded to above positively showed that the plaintiff was guilty of unconscionable and improper conduct. Two (Three) main reasons may be advanced to show that the plaintiff had abused the process of the court:
>
> (1) ...;
>
> (2) ...; and
>
> (3) in obtaining the judgment in default of defence without alerting the defendant nor the defendant's solicitors.
>
> Rule 56 of the Legal Profession (Practice And Etiquette) Rules 1978 graphically said:
>
> > Where... and [seven days] shall have elapsed after the delivery of such notice to the first-named advocate and solicitor
>
> and by necessary implication it imports the audi alteram partem rule and clearly therefore, on the facts, the plaintiff has breached the rule of natural justice by not adhering to r 56 thereof. A plain reading of r 56 clearly shows that the parties to an action must conduct their affairs in a fair orderly manner adhering strictly to the rules of natural justice. This brings to mind the decision of Edgar Joseph Jr FCJ (as he then was) in the case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor*.

[52] In *Wan Mohd Sofian bin Wan Md Saad v MBF Finance Bhd* [2000] 5 MLJ 319, Kamalanathan Ratnam J in allowing an appeal to set aside the judgment of the senior assistant registrar offers:

> There is another issue the plaintiff will have to face. Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 reads as follows:

Judgment by default

Where … unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

Clearly, the plaintiff ought to have given the defendant such notice. There is no evidence before me of any such notice being given at all. The legal profession in Malaysia is governed by the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Professional Act 1976 ('the Act'). Various subsidiary legislation in the form of rules have been gazetted under the rules-making powers contained in the said Act. The object of these rules is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Therefore, in an application to set aside a judgment obtained in breach of any of the said rules or the provisions of the Act, the court ought to consider such a breach".

[53] Such attitude is repeated by the same judge in *RHB Finance Bhd v CN Corporate Network (M) Sdn Bhd* [2000] 5 MLJ 686 at p 689, though in a more committed fashion:

Since there is no evidence before me as to when the fair order in respect of the discharge of the defendants' former solicitors was extracted and served on the plaintiffs solicitors and since as at 5 January 1999 when both counsel appeared before me, the fair order in respect of the discharge had not been extracted, I was of the view that as the defendants' solicitors were still on record it was the duty of the plaintiffs solicitors to have given the usual statutory notice pursuant to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978.

These rules are made pursuant to s 77 of the Legal Profession Act 1976. The said section reads as follows:

Power to make rules regulating practice, etc.

(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(2) Any rules made pursuant to this section shall not come into operation until they have been published in the *Gazette*.

(3) Any advocate and solicitor who fail to comply with any rules made under this section may be liable to disciplinary proceedings

(4) The Attorney General may, by order published in, the *Gazette*, make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

Whilst sub-s (3) of s 77 provides for the possibility of disciplinary proceedings against the advocate and solicitor breaching a rule I am of the view that any breach of any rule ought to be considered by the court for its relevancy. What is the purpose of r 56. Surely it does not mean that if a solicitor deliberately flouts it by failing to give the notice all he can be liable for is a possible disciplinary proceeding against him. I am of the view that the true purport and effect of introducing this rule is to show to practising lawyers that they cannot take in default judgment unless they comply with the provisions of the rule. Any breach of r 56 therefore must of necessity entitle the defendant, if he can successfully show the breach, to set aside the judgment obtained in default...

I am aware of the decision in *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33, where the court held that non-compliance with r 56 does not

render the judgment in default of defence irregular. The learned judge went on to hold that under O 1 r 1 of the Rules of the High Court 1980 ('the RHC'), only failure to comply with the RHC should be treated as an irregularity. It is my judgment that once an advocate and solicitor has been shown to have breached r 56 then, notwithstanding the fact that he has not breached any of the rules of the RHC, the court is always empowered under its inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court (see O 92 r 4 of the RHC). Since the plaintiff's solicitors have confirmed that no notice pursuant to r 56 has been given to the plaintiff, I dismissed the appeal.

[54] Holding a different view from the above three decisions is the case of *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors*. Here Zakaria Yatim J (as he then was) expresses it in the following manner:

The question to be considered here is whether non-compliance with r 56 renders the judgment obtained in default of defence an irregular judgment.

The Practice and Etiquette Rules 1978 were made by the Bar Council for the purpose of 'regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.' See s 77(1) of the Legal Profession Act. Subsection (3) of s 77 of the Act states that any advocate and solicitor who fails to comply with the said Rules may be liable for disciplinary proceedings...

In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act to make rules to regulate procedure of legal proceedings.

The rules regulating and prescribing the procedure and practice to be followed by the High Court are found in the Rules of the High Court 1980. These rules were made by the Rules Committee under powers conferred upon it by s 17 of the Courts of Judicature Act 1964. Order 1 r 2(1) of the Rules of the High Court explicitly states that 'these rules shall have effect in relation to all proceedings in the High Court...

It is clear, therefore, that non-compliance with r 56 of the Practice and Etiquette Rules 1978 does not render the judgment in default of defence, as in the instant case, irregular.

[55] Of the four opinions so expressed by the courts of concurrent jurisdiction, we are of the view that the one enunciated in *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* is to be preferred.

[56] The Legal Profession (Practice and Etiquette) Rules is, as declared in s 77(1) of the Legal Profession Act 1976, only for the purpose of regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. It is an in house regulation of members of the Bar. And any breach thereof, an advocate and solicitor is liable to be disciplined under the said rules. The rules made thereunder have no force of law to override or govern the procedure of the courts. In the subordinate courts, the. rules regulating and prescribing the procedure are the Subordinate Courts Rules 1980. These are effected under the powers conferred upon the Rules Committee by virtue of s 17 of the Courts of Judicature Act 1964. No other rules except those made under any written law which expressly decree that it should be

applied to the subordinate courts can have the force of law to change, add on, alter or amend the Subordinate Courts Rules 1980. The Legal Profession (Practice and Etiquette) Rules certainly does not contain such powers. To permit such intervention into Subordinate Courts Rules 1980 and insist that failure to comply with any of its rules will affect the legal proceedings and adulterate the rules of the court. The requirement of tendering notice to the other side before default judgment can be requested is only one of the many rules in the Legal Profession (Practice and Etiquette) Rules. The courts cannot accept the demand of its adherence over and or besides its own. To accommodate may open a floodgate where other in-house rules, though having the effect of law governing its members in an organization, may demand for its compliance before any order of the courts can be granted. These would pollute the Subordinate Courts Rules 1980 which must at all times be the only rules governing proceedings in the subordinate courts. It is thus our opinion that a breach of r 56 of the Legal Profession (Practice and Etiquette) Rules by the plaintiff in this case in not giving prior notice to the defendant before judgment in default was entered is not detrimental to the plaintiff in this case. It does not make the judgment obtained on 1 November 1999 by the plaintiff irregular.

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Second Issue: Breach of O 28 r 6 of the Subordinate Courts Rules 1980

[57] The second issue in contention is that the learned sessions court judge should not have entered judgment in default when the defendant has filed an appearance in this case. According to the defendant's counsel, the learned sessions court judge should have specifically ordered the defendant to file his defence by a certain date, and only when the defendant fails to comply with such order can the said judge be permitted to enter default judgment. To sustain this proposition, he cited to us the case of *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* [1982] 2 MLJ 79 and *Lee Ah Kong v Leong Koo* [1996] 2 MLJ 229.

[58] Order 28 r 6 of the Subordinate Courts Rules 1980 deals with a situation where the defendant does not appear at a hearing (other then proceedings by or against the government (O 43) and Moneylenders' Actions (O 45) of the case. It provides:

> the court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim; and
>
> (b) if the defendant has a counterclaim, dismiss the counterclaim with costs; and
>
> make any other order as it thinks just.

[59] Ajaib Singh J in *Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd* ruled that default judgment should not be granted against the defendant at a hearing when the defendant himself did not appear but his counsel did. The learned judge feels that:

> The learned magistrate was not empowered to invoke r 6(1)(a) of O 28 and give judgment by default. If the learned magistrate was not inclined to exercise his discretion in favour of

granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subjected to cross-examination by the defendant's counsel who would also have had the right to call witnesses for the defence and to make a submission to the court at the end of the hearing.

[60] This approach seems to have the tacit approval of the Court of Appeal in *Lee Ah Kong v Leong Koo* when Shankar JCA said:

Order 28 r 6 of the Subordinate Courts Rules 1980 ('the SCR') has been so worded as to give the court an option either to give a judgment in default of the presence of the defendant and his counsel (see Shaharuddin bin Abdul Rahman v Satisah Ismail Sdn Bhd), or to make any other order as it thinks just, which would include the power to require the plaintiff to give evidence in support of his claim before judgment is given. That the court can give a default judgment at the trial without requiring evidence can be seen when a comparison is made with O 45 rr 5 and 6 which require leave of the court before a judgment is entered in default of appearance. But whether it should do so under O 28 r 6 in a particular case calls for the exercise of a judicial discretion.

[61] But both O 28 r 6 of the Subordinate Courts Rules 1980 and the principles of two cases above deal with situation where the case is fixed for hearing. In the case before us, a date for hearing was yet to be fixed. On 1 November 1999 when the summons was called up the second time, it must be considered a mention date. It was for the purpose of ascertaining whether pleadings is closed and, if so, to fix a hearing date. When it is not a hearing date then the provision of O 14 r 5 of the Subordinate Courts Rules 1980 must apply. Here it provides:

Rule 5(1)

A defendant who disputes his liability for the whole or part of any claim in the action may —

(a) at any time before the return day, serve on the plaintiff a notice of appearance or a defence, as the case may be, for which the notice of appearance appended to the summons may be used; or

(b) appear on the return day and dispute the plaintiff's claim.

Rule 5(2)

Where a defendant appears in court and disputes the plaintiffs claim, the court may order him to serve a defence within such time as it may direct.

Rule 5(3)

If a defendant fails to comply with the order of the court made under paragraph (2), the court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff.

[62] From facts stated, the defendant had filed an appearance before the first return date of the summons — at any time 27 September 1999. On that day itself, since defence was not filed, the learned sessions court judge on the request of the defendant's counsel granted him or his counsel time to file defence and the next

mention date — at any time 1 November 1999 was fixed. When no defence was filed by 1 November 1999 and without the presence of the defendant or his counsel to offer any explanation by 9.10am the learned judge exercised his discretion and entered judgment in default against the defendant. This, we feel was within his rights and power permitted under O 14 r 5(2) of the Subordinate Courts Rules 1980 where the defendant had failed to comply with his previous order handed down on 27 September 1999 — at any time to file the defence.

[63] Counsel for the defendant attempting to salvage his contention tried to impress upon us that the order handed down by the learned sessions court judge on 27 September 1999 did not specify when the defence should be filed. He argued that before the learned sessions court judge can exercise his discretion to enter default judgment there must be failure to comply with O 14 r 5(2) which speaks of 'within such time as may be directed'. Since the court in the previous occasion (27 September 1999) did not direct a specific time to file defence then judgment in default cannot be entered against the defendant on 1 November 1999.

[64] This line of approach is not attractive to us. When defence was not filed on 27 September 1999, at the request of the defendant, the learned sessions court judge granted indulgence. The reason he ordered another mention date to be fixed must be implied to mean that defence ought to be filed by the defendant before 1 November 1999. There can be no other inference to the drawn except compliance of this order by the next mention date. We feel that the demand for the learned sessions court judge to specifically spell out a particular date to file defence is unnecessary in the circumstances of this case.

Third issue: Merits of the case

[65] Though a judgment in default is regularly obtained, the court still possesses the unfettered discretion to set it aside, The test to be applied for such evaluation is that of Lord Atkin in the classic case of *Evans v Bartlam [1937] AC 473* where he pronounced that:

> The courts have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there, must be an affidavit of merits, meaning the applicant must produce to the court evidence that he has a prima facie defence.

[66] Here the defendant accuses the plaintiff of having short supplied the defendant of the diesel ordered. For this, the defendant insists that the plaintiff must provide further and better particulars. In fact this request was made three days before 1 November 1999 by a letter from the defendant's solicitor to the plaintiffs solicitor. Since the plaintiff had refused to oblige, the defence could not be filed in time. Subsequently, on 3 December 1999, pursuing this matter further, the defendant filed an application in court seeking such information.

[67] On the latter accusation, we find no justification. The defendant must be in possession of all the delivery notes for each delivery made by the plaintiff. Having the benefit of these and with the alleged knowledge of the short supply as claimed, then

there should be no difficulty in ascertaining the shortfall and from which shipment. With this information computation can be made as to the amount of diesel short supplied and its value. The figure arrived at can then be set-off against the amount claimed by the plaintiff. This exercise does not require further and better particulars from the plaintiff.

[68] As for the former complaint, there is no evidence that the defendant has ever complained of such discrepancies (short supply) to the plaintiff. Every delivery note, with the amount of diesel supplied listed thereon, were duly signed and acknowledged by the defendant as true and correct. The defendant had opportunity to check the quantity before acceptance. By acknowledging on these delivery notes the defendant is deemed to have accepted the amount supplied as correct. Now merely claiming short supply, even in police reports, lodged by the defendant, is insufficient to satisfy this court that there is merit to warrant a setting aside of the default judgment.

[69] My learned brother Abdul Kadir Sulaiman JCA associates himself with this judgment whilst my learned brother Abdul Aziz Mohammad JCA is writing a separate judgment on the matter.

CONCLUSION

[70] By reasons aforesaid, we accordingly dismiss this appeal with cost and order that the deposit be towards the account of taxed costs.

Appeal dismissed.

Reported by Sally Kee